IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SUR TAX REFERENCE No 5 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

2 to 5: No

COMMISSIONER OF SUR-TAX

Versus

MIHIR TEXTILES LTD.

Appearance:
MR P.G. DESAI for MR MANISH R BHATT for Petitioner
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

Date of decision: 15/09/98

ORAL JUDGEMENT

(per A.R. Dave, J.)

The Income Tax Appellate Tribunal, Ahmedabad Bench-A has referred for the opinion of this court the following questions under provisions of sec. 18 of the Companies (Profits) Surtax Act, 1964 (hereinafter

referred to as the Act) read with sec. 256(2) of the Income-tax Act, 1961.

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has been right in law in holding that there was no justification for the Commissioner assuming jurisdiction under sec. 16(1) of the Sur-tax Act, 1964?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has been right in law in setting aside the order of the Commissioner made under sec. 16(1) of the Sur-tax Act, 1964?"

2. The facts giving rise to the present reference are as under:-

3. The chargeable profit of the assessee assessed under the Act for the A.Y. 1974-75 was Rs. 46,65,638 and on the said basis, the Sur-tax Officer had assessed the surtax payable by the assessee under assessment order dated 22.9.1977. Thereafter the Commissioner of Income-tax had passed an order dated 16.4.1979 under sec. 16(1) of the Act as the amount of depreciation determined by the I.T.O. for the relevant assessment year was much higher than the amount of depreciation arrived at by the assessee company in the process of calculating its chargeable profit. It has been stated in the order dated 16.4.1979 passed by the C.I.T. that net value of the assets of the assessee as on 1.4.1973 as shown in the books of the assessee company was Rs. 2,35,11,524 whereas written down value of the assets of the company after deducting depreciation under the provisions of the Income-tax Act was Rs. 1,54,94,310. The difference was because of different method of calculating depreciation adopted by the assessee company in its books of accounts and the method adopted by the I.T.O. in the course of assessment under provisions of the Income-tax Act.

3. Moreover, the CIT had also found that though development rebate was allowed at 100% in the proceedings under Income-tax Act, only 75% of the amount was deducted from the Profit & Loss Account of the assessee company and therefore the general reserve should have been reduced by an amount equivalent to 25% of the development rebate as per the provisions of rule 1(iii) of the Second Schedule to the Act.

4. In the circumstances, the CIT had directed the

STO to reframe the assessment order after considering the facts stated hereinabove.

5. The order referred to hereinabove passed by the CIT was challenged before the Tribunal. The Tribunal was pleased to allow the appeal filed by the assessee by observing that the difference arrived at under both the methods of calculating depreciation would not matter much for the reason that at any rate total depreciation calculated under both the methods, namely straight-line method and written down value method, would not permit the assessee to claim depreciation beyond the original cost of the asset. The Tribunal therefore did not give much importance to the discrepancy in the amount of depreciation which had arisen in the year of assessment. Even with regard to the amount of development rebate, the Tribunal found that the assessment of the STO was correct.

6. In the above-referred circumstances, the questions of law, which have arisen from the order of the Tribunal, have been referred to this court for its consideration.

7. We have heard learned advocate Shri P.G. Desai appearing for the Revenue. It has been submitted by him that the order passed by the CIT, whereby the STO was directed to recalculate the amount in the light of the observations made by the CIT, was just and proper for the reason that, as per the provisions of rule 1(iii) of the Second Schedule to the Act, for the purpose of computing capital, reserves as reduced by the amounts credited to such reserves as have been allowed as a deduction in computing the income of the company for the purpose of Income-tax Act, are to be taken into account. The amount of depreciation which was taken into account by the STO at the time of assessment was not based on the method adopted under the provisions of the Income-tax Act and less amount of depreciation was taken into account by the STO than the amount of depreciation which was to be deducted as per the provisions of the Income-tax Act. It has been submitted by him that as per provisions of the Income-tax Act, for the purpose of arriving at the amount of depreciation, written down value method of calculating depreciation is to be adopted. In the instant case, the assessee company had adopted another method whereby less amount of depreciation was arrived at and the said fact had ultimately resulted into inflated capital. He has relied upon the judgment delivered by this court in the case of Anup Engineering Ltd. v. Commissioner of Surtax/Income-tax (211 ITR 196).

8. We find substance in what has been submitted by the learned advocate appearing for the Revenue. As per the law laid down in the case of Anup Engineering Ltd. vs. Commissioner of Surtax/Income Tax (supra), it is clear that, when the depreciation actually allowed in the assessment proceedings under Income-tax Act exceeds the depreciation provided in the books of accounts, the excess amount of depreciation is required to be deducted from the general reserve for the purpose of including the reserves while computing the capital for the purpose of ascertaining surtax. Similar view has been taken by the Bombay High Court in the case of CIT v. Zenith Steel Pipes Ltd. (112 ITR 215). In view of the above-referred position, it is clear that the order passed by the CIT directing the Surtax Officer to re-frame the assessment in accordance with law is just and proper because, as per provisions of rule 1(iii) of the Second Schedule to the Act, it is very clear that the amount of depreciation allowed as per the provisions of the Income-tax Act is to be deducted from the reserves.

9. So far as reference to development rebate actually deducted for the purpose of computation of statutory deduction is concerned, it is also very clear that 100% development rebate ought to have been deducted from the reserves but as the company had deducted only 75% of the development rebate, the remaining 25% ought to have been deducted from the amount of the general reserve. Thus, the CIT was also right in coming to the conclusion that the S.T.O. ought to have deducted 100% of development rebate from the amount of reserves for the purpose of computing the capital.

9. In view of the above-referred position, we answer both the questions referred to this court in the negative in favour of the Revenue and against the assessee.

The reference stands disposed of accordingly with no order as to costs.
